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<u>BY HAND DELIVERY</u>

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: MM Docket No. 91-221
Review of the Commission's Regulations
<u>Governing Television Broadcasting</u>

Dear Mr. Caton:

Transmitted herewith on behalf of Pappas Stations Partnership are an original and four copies of its reply comments filed in connection with the *Second Further Notice of Propose Rule Making*, FCC 96-438 (released November 7, 1996), in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,

Andrew S. Kersting
Counsel for
Pappas Stations Partnership

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

MAR 2 1 1997

In the Matter of	)	
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	

To: The Secretary

REPLY COMMENTS OF
PAPPAS STATIONS PARTNERSHIP

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March 21, 1997

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SUMMARY

The record in this proceeding fully supports a substantial relaxation of the television duopoly rule. The rule should be revised to prohibit the common ownership of two television stations only where they are located within the same DMA and their Grade A contours overlap. The Commission also should relax its duopoly rule, however, to permit the common ownership of two stations in the same DMA, regardless of any Grade A overlap, where (i) at least one of the stations is a UHF station; or (ii) the combined market share of *any* two such stations does not exceed 35% of the total viewing audience in that market.

The record in this proceeding also establishes that LMAs provide substantial public interest benefits. Therefore, consistent with Congressional intent, the Commission should grandfather all existing LMAs and permit their renewal and transfer without limitation.

With respect to the radio-television cross-ownership rule, the Commission should extend its presumptive waiver policy to any television market that satisfies the minimum independent voice test. The test should be modified, however, to require 15 independent voices outside the top 50 television markets. The independent voice analysis should include all forms of broadcast media, as well as local cable origination programming and other non-broadcast media.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	

To: The Secretary

REPLY COMMENTS OF PAPPAS STATIONS PARTNERSHIP

Pappas Stations Partnership ("Pappas")[1] hereby submits these reply comments in connection with the Commission's *Second Further Notice of Proposed Rule Making*, FCC 96-438 (released November 7, 1996) ("*Second Further Notice*"), in the above-captioned proceeding.

I. The Record in this Proceeding Supports a Substantial Relaxation of the Television Duopoly Rule to Permit the Common Ownership of Two Television Stations Within the Same DMA Where the Stations' Grade A Contours Do Not Overlap, and In Different DMAs Even Where There Is Grade A Overlap.

In order to restrict regulatee conduct, the Commission must do more than "posit the existence of the disease sought to be cured."[2] It must, instead, make reasonable findings of actual harm based on the evidence of record before it.[3]

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[1] As noted in the Comments of Pappas Stations Partnership, MM Docket No. 91-221 (filed February 7, 1997), Pappas Stations Partnership, through affiliated entities, currently is the licensee of seven full-power television stations, two radio stations, two separately-programmed LPTV stations (affiliated with Univision and Fox, respectively), and is a party to six LMAs. For ease of reference, the affiliated entities also will be referred to herein as "Pappas."

[2] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985).

[3] *See Arizona Public Service Commission v. U.S.*, 742 F. 2d 644, 649, n. 2 (D.C. Cir.
(continued...)

No evidence has been presented in this proceeding to support retaining the television duopoly rule in its present form. Without a factual predicate, or even the demonstration of a reasonable possibility of potential harm to the public interest in the event the rule is relaxed, the Commission cannot continue to prohibit television duopolies through the use of its Grade B overlap standard. Those commentors who propose that the existing rule be retained have failed to provide sufficient evidence that a substantial relaxation of the duopoly rule would harm the public interest. To the contrary, the rule prohibits substantial public interest benefits. For example, Pappas recently was granted a construction permit for a new television station to operate on Channel 44 at Sioux City, Iowa.[4] The grant of the permit was made conditional upon the outcome of this rulemaking proceeding, however, because the Grade B contour of the Channel 44 facility at Sioux City will overlap the Grade B contour of Pappas' Station KPTM(TV), Omaha, Nebraska.

The Sioux City market is served by two VHF stations and one UHF station, each of which is affiliated with a major network. The estimated television revenues in the market are slightly in excess of $13 million. Because of the relatively small revenue base, it would not be economically feasible to operate a stand-alone UHF facility as a fourth station in Sioux City absent the ability to utilize, at least to some extent, the modern technical equipment located at KPTM's studio in Omaha. Upon completion of construction, Channel 44 will become a Fox affiliate and air separate

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[3](...continued)
1984) ("[M]ere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy us that the agency has engaged in reasoned decisionmaking"); *Bethlehem Steel Corp. v. U.S. Environmental Protection Agency*, 638 F. 2d 994, 1004 (7th Cir. 1980) ("The record or agency decision must demonstrate and reflect the existence by the Administrator of 'reasoned discretion' and not simply manifest a 'crystal ball inquiry'").

[4] Sioux City is the 141st ranked television market. *Broadcasting & Cable Yearbook 1996*, p. C-241.

programming from Station KPTM. Therefore, absent the Commission's conditional waiver of its existing duopoly rule, the residents of the Sioux City area would have been denied a fourth over-the-air television station providing Fox programming.

In light of the substantial public interest benefits provided by such duopolies, the Commission should, at the very least, relax its duopoly rule to prohibit the common ownership of two television stations only where (i) they are located within the same DMA; and (ii) there is an overlap of their Grade A contours. As demonstrated below, however, the record in this proceeding supports a further relaxation of the duopoly rule.

II. The Commission Should Further Relax Its Duopoly Rule to Permit the Common Ownership of Two Stations in the Same DMA Under Certain Circumstances.

A. The UHF/VHF Disparity.

Several commentors argue that there should be no UHF exception to the duopoly rule.[5] MAP argues that permitting UHF/UHF combinations as a matter of course would "diminish viewpoint diversity, limit competition, and close opportunities to new entrants in the market."[6] To the extent such combinations are permitted, MAP contends that they should be allowed only "in the most narrow and compelling circumstances."[7] Post-Newsweek claims there is no reason to discount UHF station ownership, noting that UHF stations have acquired major network affiliations and significant

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[5] Comments of Media Access Project *et al.*, MM Docket No. 91-221 (filed February 7, 1997), p. 12; Comments of Kentuckiana Broadcasting, Inc., MM Docket No. 91-221 (filed February 10, 1997), p. 5; Comments of Post-Newsweek Stations, Inc., MM Docket No. 96-222 (filed February 7, 1997), p. 4 ("Post-Newsweek").

[6] MAP at 14.

[7] *Id.* at 13.

viewership shares. Post-Newsweek also contends that, in light of cable, there is no justification for distinguishing between UHF and VHF stations.[8]

Despite these comments, the fact is UHF stations continue to operate at a substantial disadvantage *vis-a-vis* VHF stations. Due to their inferior signal propagation, UHF stations have a smaller coverage area, a fact reinforced by the replication proposals in the ATV proceeding (MM Docket No. 87-268), the end result of which is smaller audiences and less revenue. Their costs of operation (*e.g.*, power costs) are substantially higher,[9] and they do not share the same recognition and established competitive status that their VHF competitors enjoy, especially in intermixed markets. Even in all-UHF markets, the smaller coverage areas of the local UHF stations put them at a decided disadvantage with respect to multi-channel video providers. In markets with VHF stations, UHFs typically are not affiliates of the three established networks (*i.e.*, ABC, NBC, and CBS), and have revenue and audience shares which are fractions of their VHF counterparts.

Although cable penetration has increased and many UHF stations are carried on local cable systems, a number of stations are not able to avail themselves of must-carry status because, as a result of their smaller coverage area, they are not able to provide a sufficient quality signal to the cable system's principal headend. Those UHF stations which are entitled to coverage generally have less desirable channel positions and less promotional resources to secure audiences for their programming, off air or on cable.

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[8] Post-Newsweek at 4.

[9] As the Commission is well aware, few UHF stations can afford to operate at maximum power.

Moreover, the Conference Report on the Telecommunications Act of 1996 ("1996 Act") reflects Congress' judgment that VHF stations typically are the strongest in the local market.[10] The advent of DTV will not eliminate the UHF/VHF disparity because the proposed allotment table is based on *replication* of existing coverage areas, rather than equalization of coverage. Therefore, the UHF disparity should continue to be recognized as a critical factor in weighing diversity and competition in local television markets.[11]

B. The UHF Exception.

Saga contends that if a multiple station operator ("MSTO") acquires two stations in a market, it will thereby achieve "market power" and will only attempt to reduce its production expenses.[12] Saga claims that if the FCC permits common ownership of two stations in the same market, the common owner will have no "market incentive" to produce anything other than a small amount of local news. Saga also argues, however, that if a MSTO acquires a station in the market, but is prohibited from acquiring a second station, either directly or through an LMA, it will have the incentive and financial ability (in attempting to become the number one station in the market) to

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[10] Congress stated that VHF/VHF combinations should be permitted only in "compelling circumstances." S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996).

[11] The fact that the UHF/VHF disparity continues to exist is recognized even by those opposing a change in the duopoly rule. *See* Comments of Press Broadcasting Company, Inc., MM Docket No. 91-221 (filed February 7, 1997) ("Press"). Although Press opposes any relaxation of the existing duopoly rule, Press acknowledges there are "undeniable differences between UHF and VHF stations." *Id.* at 2-3.

[12] Comments of Saga Communications, Inc. On Second Further Notice of Proposed Rule Making, MM Docket No. 91-221 (filed February 7, 1997) ("Saga"), pp. 3-4.

produce local programming because that is the only means by which it can achieve market dominance.[13]

Saga's arguments are based on nothing more than unfounded assumptions. First, Saga has offered no basis for its fundamental assumption that the mere acquisition of a second station in a market will result in market dominance. As noted above, there is a great disparity between UHF and VHF stations. Thus, there is no reason to believe that the common ownership of two UHF stations in the same market -- or even one UHF and one VHF station -- will, *ipso facto*, place the common owner in a dominant position with respect to other VHF stations in the market, particularly where those VHF stations are affiliated with a major network.

There also is no basis for the assumption that the licensee of two stations in a market has no incentive to produce any local programming other than a small amount of local news. Indeed, if it is to be assumed that the licensee of one station has the incentive and financial wherewithal to produce a substantial amount of local programming in an effort to become the number one station in the market, there is every reason to believe that the licensee of two stations would have the same incentive with respect to both of its stations, particularly because the licensee should be able to achieve certain efficiencies through its common ownership of both stations. Saga has failed to offer any factual support for its assumptions, and, thus, its arguments against permitting common ownership of two stations in the same market are based on nothing more than speculation and surmise.

Common ownership of UHF/UHF and UHF/VHF stations should be permitted, regardless of any Grade A overlap, absent a demonstration that the specific circumstances of a proposed

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[13] *Id.*

transaction would harm the public interest. Permitting the common ownership of such stations in the same market will strengthen competition and add to diversity of programming. Indeed, a weak and underfinanced UHF station adds very little to competition in the market because it cannot produce or acquire attractive programming. (A dark or "failing" station adds nothing to the competitive mix.) On the other hand, increasing quality programming choices, albeit through common ownership of two stations, is much more likely to serve the public interest.

Furthermore, in today's multi-channel environment, broadcasters no longer can be restricted to being single channel providers. Cable systems have been allowed to acquire "clusters" of systems, such that one cable MSO often controls virtually all of the cable systems in a television market. Cable system operators also have been permitted to hold interests in an almost unlimited number of cable program networks that are carried on their systems. Having permitted the growth of these powerful multi-channel competitors for audience and advertising, which are not subject to restrictions limiting the number of program services they can provide in a market, the Commission cannot now take the position that only television operators must be restricted to providing but one channel.

The Omaha DMA provides a good illustration of the significant impact that the clustering of cable systems can have in a local television market. The primary cable operator in the Omaha DMA is Cox Communications, Inc. ("Cox"), which has approximately 150,000 subscribers. There are approximately 250,000 cable homes in the DMA, and, thus, Cox presently serves approximately 60% of the total cable homes in the market.[14] Cox also airs its own local programming on Channel

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[14] Unless otherwise indicated, all references to cable and audience viewership data have been obtained from Nielsen's *Viewers and Profile Report*, February, 1997; and *Code Report*, (continued...)

2 on its system, which is programmed and promoted in the same manner as if the programming were provided by an independent television station.

The sign-on/sign-off audience viewing shares of the commercial television stations in the Omaha DMA are as follows:

KETV, Omaha (ABC):	19
KMTV, Omaha (CBS):	18
KPTM, Omaha (Fox):	8
KXVO, Omaha (WB):	4
WOWT, Omaha (NBC):	18

The aggregate viewing audience of the above stations amounts to a 67 share. Because there is no spill-in from other television markets, it is clear that cable has acquired the remaining 33% of the total viewing audience. Thus, Cox not only airs its own locally-originated programming on a most favorable channel position, it also serves 60% of the total cable homes in a market in which cable has acquired one-third of the total viewing audience.

A similar example is provided by Continental Cablevision, Inc.'s ("Continental") clustering in the Fresno-Visalia DMA.[15] Continental has clustered so well that it has acquired 72% of the cable homes in the market (166,600 subscribers out of a total of 231,675 cable homes). The sign-on/sign-off cumulative audience share of television stations in the Fresno market is 72%. The remaining 28% has been acquired by cable. Like Cox in Omaha, Continental is providing its own local

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[14](...continued)
February, 1997. Cox also has openly announced that it is seeking to acquire additional cable systems in the remainder of the DMA, and is reported to be negotiating to acquire cable systems serving Lincoln, Nebraska, which constitutes a substantial portion of (Pappas-owned) Station KPTM's service area.

[15] The Fresno-Visalia DMA is the 56th ranked television market. *Broadcasting & Cable Yearbook 1996*, p. C-240. Pappas is the licensee of Stations KFRE(AM), Fresno, KMPH-FM, Hanford, and KMPH(TV), Visalia, all of which operate within the Fresno DMA.

entertainment and sports programming on a most desirable channel position, Channel 4. Pappas estimates that Continental bills approximately $4 million annually.[16] This is more than the annual billing of five of the smaller television stations in the market, and nearly as much as those five stations combined.[17]

The above examples demonstrate that due to the clustering of cable systems in the Omaha and Fresno television markets (which are well on their way to becoming completely clustered), competition between television stations and multi-channel cable operators in each of those markets is very real. Cox and Continental currently hold 33% and 28% of the total viewing audience in those respective markets. In addition, they both air their own locally-originated programming on highly desirable channel positions, and, just as local television stations, sell ads for their programming. In light of the substantial viewing audience currently being acquired by local cable systems, the Commission must focus on the now common and well-established practice of clustering cable systems, and its substantial competitive impact upon local television markets. In order to ensure the continued vitality of free, over-the-air television, the Commission must adopt an exception to its relaxed duopoly rule to permit the common ownership of two television stations within the same DMA, regardless of any Grade A overlap, where one of the stations is a UHF station.

Furthermore, in order to make some attempt at leveling the playing field in the multi-channel video programming market in which television stations compete, the Commission should permit the

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[16] This estimate is based on a market analysis by Pappas' Sales Manager of Station KMPH(TV), Charlie Pfaff, who has approximately eight years of experience in the Fresno market.

[17] The five stations are KMSG-TV, Channel 59, Sanger (Telemundo); KAIL(TV), Channel 53, Fresno (UPN); KGMC(TV), Channel 43, Clovis (IND); KKAG(TV), Channel 61, Porterville (IND); and KNSO(TV), Channel 51, Merced, all California.

common ownership of *any* two television stations in the same DMA, regardless of Grade A overlap, so long as the combined market share of the two stations does not exceed 35% of the total viewing audience in that market.[18] The Commission should adopt each of these proposed exceptions by rule, rather than through a waiver process, in order to avoid the need for the FCC and broadcasters to expend substantial resources on waiver requests, and to provide greater certainty to parties contemplating acquiring additional stations.

III. Relaxation of the Television Duopoly Rule Should Not Be Limited to Failed Stations.

With respect to the Commission's bi-polar concerns of promoting diversity and competition, common sense dictates that having two operating stations is better than only one, even where the two stations are commonly owned. MAP contends, however, that the Commission should not permit failed-station waivers "except in the most extreme of circumstances."[19] MAP proposes that if a station has been off the air for one year, and there are no new entrants willing to apply for the license, the FCC may then consider a waiver of its duopoly rule, but the proponent still must comply with

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[18] In its initial comments in this proceeding, Pappas proposed that the Commission should permit the common ownership of two VHF stations in the same market only in "unusual and compelling circumstances." *See* Comments of Pappas Stations Partnership in MM Docket No. 91-221 (filed February 7, 1997) ("Pappas"), p. 9. However, upon further reflection, and after analyzing the extent to which its stations currently are operating at a competitive disadvantage due to the clustering of local cable systems, Pappas strongly urges the Commission to permit the common ownership of any two television stations in the same DMA, regardless of contour overlap, so long as the combined market share of the two stations does not exceed 35% of the total viewing audience in any given market. The 35% cap is derived from the significant viewership local cable systems have achieved through the clustering of their systems and the highly desirable channels upon which they have selected to air their local programming. There is no reason to distinguish broadcasting from cable with respect to audience share.

[19] MAP at 18.

certain public interest programming and reporting requirements proposed by MAP.[20] MAP further contends that the FCC should not permit waivers for "failing" stations because this would only provide an incentive for stations to fail in anticipation of a profitable sale to a larger broadcaster.[21]

Requiring that stations be in severe financial distress or off the air before they may be acquired essentially dictates that stations air marginal programming (*i.e.*, inexpensive, low-quality non-local fare), often for considerable periods of time, prior to their collapse. This would contravene the public interest by diminishing the availability of quality programming the Commission encourages, *i.e.*, news, public affairs, and children's programming. This is particularly true in smaller markets where the advertising base is small and stations are more likely to struggle financially. Thus, MAP's proposal of requiring stations to operate with marginal programming for some time prior to failing, and then requiring them to remain off the air for one year before being eligible for common ownership, serves no interest -- public or private.[22]

Furthermore, MAP's contention that a "failing" station waiver criterion would provide an incentive for stations to fail is wholly unsupportable. Like other entrepreneurs, broadcasters do not

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[20] *Id.* MAP's proposal that the FCC impose certain public interest programming and reporting requirements raises serious First Amendment concerns. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L.Ed. 2d 497, 522 (1994):

> [T]he FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what they want to hear.

[21] MAP at 18.

[22] MAP's proposal of requiring stations to go dark for one year before being eligible for common ownership is absurd. Indeed, Section 403(l) of the 1996 Act expressly provides that any station which remains silent for 12 consecutive months shall lose its license. 47 U.S.C. §312(g).

enter the business in order to fail and sell out. Because successful stations are worth far more than failing stations, rational assumptions about human behavior suggest that stations will make every effort to succeed in order to command as high a price as possible from a prospective buyer. Not surprisingly, MAP has failed to offer even one scintilla of evidence to advance its novel theory.

IV. Existing LMAs Should Be Grandfathered and Remain Freely Assignable; No Valid Justification Has Been Offered for Placing a Limit on Their Duration.

According to MAP, LMAs are "anti-diversity, anti-competitive," and constitute an unauthorized transfer of control.[23] MAP therefore contends that LMAs should be abolished and should not be grandfathered except in compelling circumstances.[24] MAP also wishes to place arbitrary time limits on grandfathered LMAs.[25]

Despite MAP's views, the fact is that there has been no evidence submitted in this proceeding to even suggest that any LMA has resulted in an abuse of market power. Because LMAs typically involve a weaker UHF station as opposed to market-dominant VHF stations, they generally enhance, rather than restrict, competition in a local market. An example of this result is illustrated in the LMA between Stations KPTM(TV) and KXVO(TV), Omaha, Nebraska.[26] Station KXVO went on the air

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[23] MAP at 29.

[24] *Id.* at 27, 29.

[25] *Id.* at 31-32.

[26] As noted above, Pappas is the licensee of Station KPTM. Although a construction permit was issued for KXVO, the station remained unbuilt for many years. Station KPTM entered into an LMA with KXVO which enabled the new start-up station to get on the air in June 1995. The stations air completely separate programming. KPTM is a Fox affiliate and KXVO is affiliated with WB. Through its affiliation with WB, Station KXVO has brought a fifth national network to the Omaha television market. KXVO uses the KPTM news staff to air local news

(continued...)

on June 12, 1995. Prior to that time, KPTM had a sign-on/sign-off audience share of either 10 or 11. Since KXVO went on the air, however, KPTM's share has dropped to an 8, and KXVO's has been a 4. This change in KPTM's audience share as a result of the operation of KXVO is significant because it demonstrates that, in addition to the substantial public interest benefits previously noted, the LMA actually *enhanced* competition in the market to the detriment of the brokering station. This result directly contradicts what many commentors in this proceeding would have the Commission believe -- that stations involved in an LMA operate in unison, in an anti-competitive manner, to the detriment of only the other stations in the market. The LMA between KPTM and KXVO clearly demonstrates that the stations have operated independently, and that the brokering station is just as likely be affected by the additional competition as any other station in the market.

A further example of a substantial public interest benefits provided by this LMA (as well as many others) involves the Commission's concern regarding the conversion to digital television ("DTV"). Stations that are in financial distress or are only marginally profitable are not going to be able to convert to DTV due to the substantial expense involved. In the case of KXVO, conversion to DTV would not even be a consideration without the LMA because the station never would have

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[26](...continued)
updates once each evening during prime time, and anticipates that it will begin airing its own newscasts within the year. The station also recently aired three one-hour forums during prime time involving Congressional and mayoral candidates and has plans for more such programming. Moreover, due to its affiliation with WB, KXVO airs a significant amount of children's and family programming, including FCC-friendly children's programming. In addition to its diversity and programming benefits, the efficiencies of operation created through the LMA enabled Station KXVO to become profitable within the first 90 days of going on the air despite the hiring of 12 new employees. *See* Pappas at 11-12.

gone on the air. As a result of the LMA, however, Pappas is contractually obligated to provide the funds necessary to construct a digital facility for the brokered station.[27]

In enacting the 1996 Act, Congress recognized the substantial public interest benefits provided by LMAs. Section 202(g) of the Act provides that nothing therein "shall be construed to prohibit the origination, continuation, or *renewal* of any television local marketing agreement that is in compliance with the rules of the Commission" (emphasis added). Moreover, the Conference Report states that the Act "*grandfathers LMAs currently in existence upon enactment of this legislation.*" H. Rep. No. 458, 104th Cong. 2d Sess. 163 (1996) (emphasis added). The conferees noted the public interest benefits of existing LMAs, and that Congress' intent was to make sure the public was not deprived of those benefits from LMAs that were in compliance with FCC regulations "on the date of enactment." *Id.*

By proposing to limit the transferability of LMAs, the Commission has interpreted the above language as requiring only that it allow existing LMAs to continue for the remainder of their current term. The FCC's narrow interpretation, however, which has been adopted by MAP, wholly ignores Congress' use of the term "renewal" in Section 202(g). The Commission's interpretation also is inconsistent with the intent of Congress, expressed in the Conference Report, that LMAs which were in compliance with the Commission's rules on the date of enactment of the Act should not be disrupted.

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[27] Despite the Chairman's recent statements advocating a swift conversion to DTV, the Commission must recognize that broadcasters are going to have a very difficult time obtaining financing to construct new digital facilities. Indeed, few lenders are going to provide the necessary funding when there currently is no audience for the new digital signal, and, thus, no advertising market in which to generate revenues.

The record in this proceeding establishes that LMAs have provided substantial public interest benefits in many markets.[28] Those stations which have made substantial investments in improving the facilities and programming of a brokered station they program under an LMA should not have their investments terminated. Indeed, in many cases, these broadcasters' decisions to expend such funds were based on the assumption that their LMAs would remain in place for the full term of their agreement, including any renewal term, and possibly beyond. Therefore, at a minimum, the Commission should grandfather all existing LMAs, and permit their renewal and transfer in accordance with the terms of the agreement.

V. The Radio-Television Cross-Ownership Rule Should be Substantially Revised Such that the Presumptive Waiver Policy Should Be Extended to Any Television Market that Satisfies the Minimum Independent Voice Test.

As demonstrated in Pappas' stewardship of Stations KFRE(AM), Fresno, KMPH-FM, Hanford, and KMPH(TV), Visalia, California, common ownership of radio and television stations in the same market can provide substantial public interest benefits that otherwise would not exist. Not only did Pappas' common ownership of these three stations prevent the radio stations from going dark, but, as demonstrated in Pappas' comments,[29] KMPH(TV) has subsidized the costs of operation of the radio stations, which has enabled KMPH-FM to become a 24-hour all news station. Pappas is aware of only one other FM station in the country in a below-50 market that offers a 24-hour all news format, and it too is operated in combination with a television station in the same market.

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[28] *See, e.g.*, Pappas at 11-14; Comments of the National Association of Broadcasters, MM Docket No. 91-221 (filed February 7, 1997), pp. 19-20.

[29] *See* Pappas at 15-16.

There has been little if any evidence presented in this proceeding to suggest that there will be any threat to diversity or competition if the radio-television cross-ownership rule is relaxed as Pappas proposes. Although Spectrum Detroit attacks the Commission's five-factor waiver test, and, in particular, its application in the CBS-Westinghouse and CBS-Westinghouse-Infinity mergers,[30] Spectrum Detroit fails to present any evidence demonstrating that the Commission's grant of the requested waivers poses a material threat to either diversity or competition in any given market. Instead, Spectrum Detroit's comments reflect the efforts of a disgruntled potential purchaser who is upset that, despite its offer to purchase a Detroit radio and television station, the stations were ultimately sold to CBS.[31]

The radio-television cross-ownership rule unnecessarily burdens the FCC, treats television station owners less favorably than radio station owners without any rational basis, and produces no meaningful public interest benefits. In light of the antitrust laws, the local radio ownership rules, and the local and national TV ownership rules, no purpose is served by maintaining an additional rule regarding radio/TV combinations. Indeed, there is no reason not to apply a presumptive waiver policy to entities seeking to own more than one radio station in the same market where the proposed combination would (i) involve radio stations not in excess of the local radio ownership rules, and (ii) satisfy the minimum independent voice test. Moreover, because existing combinations were grandfathered when the rule was adopted, the FCC is repeatedly faced with numerous waiver requests when any of those stations are transferred. The waiver process unnecessarily burdens both

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[30] Comments of Spectrum Detroit, MM Docket No. 91-221 (filed February 7, 1997), pp. 8-21 ("Spectrum Detroit").

[31] *See Id.* at 20.

licensees and the FCC, which must devote scarce resources to reviewing the requests for waiver of this unnecessary prohibition.

Furthermore, because it is often in the smaller markets where the benefits of common ownership are most likely to occur, Pappas urges the Commission to modify its minimum independent voice test to require 15 independent voices outside the top 50 television markets. The independent voice analysis should include not only all forms of broadcast media, but local cable origination programming as well as other non-broadcast media.[32]

VI. Conclusion

As demonstrated herein, the record in this proceeding fully supports a substantial relaxation of the television duopoly rule. Accordingly, the rule should be revised to prohibit the common ownership of two television stations only where (i) they are located within the same DMA, and (ii)

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[32] The Commission has made clear that other media sources such as radio, newspapers, magazines, cable, and other alternative media sources such as direct broadcast satellite and MMDS services are appropriately considered in any "diversity of programming" analysis under the duopoly rule:

> [W]e have begun to view the broadcast media, and particularly television, as being part of a wider media environment .... We now believe it is unrealistic to consider broadcast television station ownership in isolation when analyzing outlet diversity, and we propose to take other media into more specific account in assessing diversity.

Review of the Commission's Regulations Governing Television Broadcasting, 10 FCC Rcd 3524, 3551-52 (1995). See also Station Partners, 10 FCC Rcd 12383, 12386-87 (granting a permanent waiver of the duopoly rule based in part on the presence of "competing media," including radio, cable systems, direct broadcast satellite, and newspaper); Citadel Communications Co., Ltd., 8 FCC Rcd 855, 858 n.10 (1993) (granting a permanent waiver of the rule based in part on the cable penetration rate); Knoxville Channel 8 Limited Partnership, 4 FCC Rcd 4760, 4760-61 (1989) (granting a temporary waiver of the rule based in part on the "numerous other media services available," including daily newspapers and low power television stations). The same diversity analysis should apply in the radio-TV cross-ownership context.

there is an overlap of their Grade A contours. However, the Commission also should relax its duopoly rule to permit (i) the common ownership of two stations in the same DMA, whose Grade A contours overlap, where at least one of the stations is a UHF station; and (ii) the common ownership of *any* two television stations in the same DMA, regardless of Grade A overlap, so long as the combined market share of the two stations does not exceed 35% of the total viewing audience in that market.

Because the record in this proceeding establishes that LMAs provide substantial public interest benefits, the Commission should grandfather all existing LMAs and permit their renewal and transfer in accordance with the terms of the agreement.

With respect to the radio-television cross-ownership rule, the Commission should extend its presumptive waiver policy to any television market that satisfies the minimum independent voice test, and modify its test to require 15 independent voices outside the top 50 television markets.

Respectfully submitted,

PAPPAS STATIONS PARTNERSHIP

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